IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-5353

RUFUS JUNIOR MINCEY, Petitioner,

v.

STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF ARIZONA

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_____

The Petitioner, RUFUS JUNIOR MINCEY, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Arizona entered in this case on May 11, 1977, and made final by the order of the Supreme Court of the State of Arizona, denying both parties' motions for rehearing entered on June 28, 1977.

OPINION BELOW

The opinion of the Supreme Court of the State of Arizona, filed May 11, 1977, is reported at ____ Ariz. _____, 566 P.2d 273, and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Arizona was entered on May 11, 1977. A timely motion for rehearing was denied on June 28, 1977, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

* * *

QUESTIONS PRESENTED

1. Did not the admission of evidence obtained in a four-day-long warrantless search of Petitioner's apartment after the apartment had been secured by police violate Petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution?

2. Did not the admission of Petitioner's responses to police questioning made while Petitioner was a patient in the intensive care unit of a hospital violate Petitioner's privilege against self-incrimination, and rights to counsel and due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal United States Constitutional provisions involved are the Search and Seizure Clause of the Fourth Amendment, Self-Incrimination Clause of the Fifth Amendment, Right to Counsel Clause of the Sixth Amendment and Due Process Clause of the Fourteenth Amendment, the pertinent texts of which are as follows:

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

Amendment XIV, Section I:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

Arrest and Search

This Petition arises out of an incident in Tucson, Arizona,

on October 28, 1974, in which an undercover police narcotics officer was mortally wounded. At approximately 2:00 p.m., on that date, undercover officer Barry Headricks went to an apartment leased by Petitioner, Rufus Mincey, accompanied by Charles Ferguson. Officer Headricks wore longish hair, a mustache, a flower print shirt, cowboy boots, levis and a levi jacket to hide his true identity as a police officer. After being admitted into the apartment, an offer to sell narcotics allegedly was made for which Petitioner and Charles Ferguson were later charged. Headricks then left the apartment with the purported purpose of returning with money to pay for the drugs.

Headricks returned to the apartment with nine other plain clothes officers and a deputy county attorney; they intended to enter the apartment by a ruse and thereafter to arrest the occupants of the apartment and seize any evidence. Headricks and another officer went to the apartment door with drawn guns hidden behind their backs. The remaining officers and a deputy county attorney hid in the hallway on either side of the door with their guns drawn as well. The door was opened by John Hodgman.

After Officer Headricks slipped into the apartment, Hodgman attempted to close the door, but the remaining officers forced the door back, pushing Hodgman partly through the wall behind the door. Headricks entered the bedroom at the back of the apartment and shortly thereafter some thirteen shots were heard in rapid succession coming from the bedroom. In the gunfire, Officer Headricks and the two bedroom occupants, Mr. Mincey and Deborah Johnson, were wounded. Charles Ferguson was also wounded by a bullet which passed through the bedroom wall. Once the shooting stopped, Headricks came out of the bedroom, said something like "he's down", and fell to the ground. Mr. Mincey was found lying on his back in the bedroom, unconscious.

The entire incident transpired in a matter of seconds. The three wounded apartment occupants and Officer Headricks were transported to the hospital, and the two remaining occupants of the apartment were arrested and taken away.

After the shootings, the narcotics officers did no investigating; they secured the scene, but waited for a special investigative team of police to arrive. The investigating officers searched the premises and examined the scene over a four day period. They started by "looking for narcotics paraphenalia" and in the course of their search learned that Officer Headricks had died of his gunshot wounds. Investigators searched every room, every drawer and every cupboard in the apartment, inventorying the entire contents of the apartment. Officers remained on duty, and kept the premises secure until the search was completed. No search warrant was obtained, and no reason was offered for not seeking one. A variety of evidence used in the subsequent prosecution was obtained as a result of the search.

Interrogation

Shortly after the shooting incident, while Petitioner was in the hospital emergency room, police Detective Hust arrived at the hospital and removed the handcuffs from him in order to facilitate treatment by the medical staff. Mr. Mincey's condition at that time was described as near to the point of coma and he was breathing insufficiently. Three or four hours later, following surgery, Detective Hust obtained permission from a nurse to interrogate Petitioner, who was then in the hospital's intensive care unit.

Mr. Mincey was unable to talk at the time of the interrogation due to the presence of a tracheal tube inserted down his throat to administer oxygen. He also had a Foley catheter tube inserted through his penis to his bladder, a tube running from his nose down into his stomach to prevent the aspiration of vomit, and was receiving intravenous fluids. In addition to oxygen and intravenous

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fluids, Mr. Mincey had received antibiotic and antitetanus drugs.

Mr. Mincey, being unable to talk, responded to Detective Hust's questions by writing his answers on paper provided by the hospital. Detective Hust did not record the questions he asked, but at a later date attempted to reconstruct the questions from Mr. Mincey's written responses and notes made by the detective the following morning. The interrogations lasted about one hour. The detective twice stopped the questioning when Mr. Mincey either fell asleep or lapsed into unconsciousness or was so exhausted as to be unable to continue, resuming the questioning after a brief pause. Mr. Mincey's confused state of mind is illustrated by the fact that he was not sure whether the same person had conducted the various sessions of questioning.

The detective began the questioning by asking Mr. Mincey to supply information that would help in locating the family of another wounded suspect. The nurse who had authorized the questioning and who had been told that Mr. Mincey was charged with murdering a police officer, told Mr. Mincey that it would help if he cooperated with Detective Hust's questioning. Thereafter, the detective advised Mr. Mincey that he was charged with killing a police officer and advised him of his constitutional rights. Mr. Mincey then advised the detective that he could say no more without an attorney present. The detective continued the questioning despite this and despite some six other requests for an attorney.

During the course of the interrogation, Mr. Mincey twice informed the detective that he was in unbearable pain and several times expressed doubt about his ability to accurately recall what had occurred. The nurse testified that Mr. Mincey had been unable to sleep since the time he entered the intensive care unit, and that she was unsure whether he was under the influence of drugs at the time.

* * *

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Trial and Appeal

At the time of trial, Petitioner, Rufus Mincey, was a twenty-three year old United States Air Force machinist who, prior to the aforementioned incident, had never been charged with a felony. Petitioner was charged with, tried by a jury, and convicted of first degree felony murder (committed in avoiding or preventing a lawful arrest), Ariz. Rev. Stat. Ann. §§13-451, -452 and -453, assault with a deadly weapon, Ariz. Rev. Stat. Ann. §13-249(B), unlawful sale of narcotics, Ariz. Rev. Stat. Ann. §36-1002.02, unlawful possession of a narcotic drug for sale, Ariz. Rev. Stat. Ann. §36-1002.01, and unlawful possession of a narcotic drug, Ariz. Rev. Stat. Ann. §36-1002. He was sentenced to life imprisonment without possibility of parole before serving twenty-five years on the first charge; ten to fifteen years imprisonment on the second, concurrent with the first; five to fifteen years imprisonment on the third, consecutive to the life sentence; five to six years imprisonment on the fourth, concurrent with the third, and two to three years imprisonment on the fifth charge, concurrent with the third.

At trial, Mr. Mincey's attorney moved to suppress the evidence seized in the search of Mr. Mincey's apartment. The motion was denied. Mr. Mincey's attorney also moved to suppress the statements made during Mr. Mincey's hospital interrogation. That motion was granted. However, over Petitioner's objection, the trial court allowed the statements made during his interrogation to be used to impeach his testimony at trial.

On appeal, the Arizona Supreme Court reversed Petitioner's convictions for murder and assault with a deadly weapon because of an erroneous mens rea instruction, and remanded the remaining counts, sentences for which had originally been designed to run consecutively to the life sentence on the murder charge, for resentencing. The Arizona Supreme Court, however, held that the

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evidence obtained in the search and interrogation here challenged was properly admitted. The court found that the search of Petitioner's apartment did not come within the exigent circumstances exception to the warrant requirement, but held that it was justified by a "murder scene exception", discussed in more detail hereafter. In so doing, the court expressly refused to follow the decision of the United States Court of Appeals for the Ninth Circuit in Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972). Further, the court held that Petitioner's responses during his in-hospital interrogation were voluntarily made and, therefore, were properly admitted for impeachment under Harris v. New York, 401 U.S. 222 (1971). Both Petitioner and Respondent timely moved for rehearing of the Arizona Supreme Court's opinion. Both motions were denied on June 28, 1977.

ARGUMENT

ARGUMENT I

THE ADMISSION OF EVIDENCE OBTAINED IN A FOUR DAY WARRANTLESS SEARCH OF PETITIONER'S APARTMENT AFTER THE APARTMENT HAD BEEN SECURED BY POLICE VIOLATED PETITIONER'S RIGHTS UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The Arizona Supreme Court upheld the admission of evidence which was the fruit of the warrantless, four day search of Mr. Mincey's apartment. That court ruled the evidence admissible under a state court created "murder scene exception", a warrantless search is lawful where (1) the search occurs at the scene of a serious personal injury with likelihood of death, (2) there is reason to suspect foul play, (3) law enforcement officers were legally on the scene premises in the first instance, (4) the search begins within a reasonable time after officials first learn of the murder or potential murder, and (5) the search is "limited [in scope] to determining the circumstances of death".

State v. Mincey, ___ Ariz. ___, 566 P.2d 273, 283 (1977), slip opinion at 23. The Court conceded that the search of Mr. Mincey's apartment did not "fit within the usual 'exigent circumstances' exception and that there was ample time to secure a warrant". Id., slip opinion at 22. Thus, if the Fourth Amendment does not countenance Arizona's "murder scene exception", the search here was unlawful and the evidence seized therein should have been excluded. Mapp v. Ohio, 367 U.S. 643 (1961).

The United States Court of Appeals for the Ninth Circuit has held the application of Arizona's "murder scene exception" contrary to the dictates of the Fourth Amendment. Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972). And the Arizona Supreme Court expressly refused to follow the holding of the Ninth Circuit. State v. Mincey, ___ Ariz. ___, 566 P.2d 273, 283 & 283 n.4 (1977), slip opinion at 22 and 22 n.4. Thus, unless this Court grants certiorari, one rule of law will govern Arizona defendants who are able to obtain review of their convictions by the Federal Courts, and another will govern Arizona defendants who are denied Federal review under Stone v. Powell, 428 U.S. 465 (1976).

A cogent summary of the principles governing availability of exceptions to the search and seizure warrant requirement appears in Coolidge v. New Hampshire.

> "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well delineated exceptions'. The exceptions are 'jealously and carefully drawn', and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative'. '[T]he burden is on those seeking the exemption to show the need for it'". Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (footnotes omitted).

See also, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). Again, this Court recently refused to expand the number and scope

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of exceptions to the warrant requirement in United States v. Chadwick, 97 S.Ct. 2476 (1977), where the government sought to expand the automobile exception. The principles there reinforced are important to Mr. Mincey's case.

> "[T]he Fourth Amendment 'protects people, not places . . .;' more particularly, it protects people from unreasonable, government intrusions into their legitimate expectations of privacy." 97 S.Ct. at 2481 (citation omitted).
>
> "The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.' . . . Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.' Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." 97 S.Ct. at 2482 (citation omitted).
>
> "Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." 97 S.Ct. at 2486.

Here, the search was of Mr. Mincey's residence, where an individual's reasonable expectation of privacy has probably received the longest and most consistent Fourth Amendment protection. The degree of intrusion is manifested by the fact that the search extended over a four day period and included inventorying every item in Mr. Mincey's apartment. Every room, drawer, cupboard, nook and cranny was searched.

The search was remote from and not incident to an arrest within the meaning of Chimel v. California, 395 U.S. 752 (1969). It was not justified by any exigent circumstances making the obtaining of a warrant impractical. Indeed, in Arizona, such circumstances are rare since a judicial warrant may be obtained at any hour of the day or night by telephonic communication. 5 Ariz. Rev. Stat. Ann. §13-1444(c) (Supp. 1973). The searched premises were placed under the exclusive dominion of police authority prior to the commencement of the search.

Further, in this case, the Arizona Supreme Court offers no explanation of the rationale for permitting a "murder scene exception" and none is provided in State ex rel. Berger v. Superior Court, 110 Ariz. 281, 517 P.2d 1277 (1974). Indeed, the only explanation ever offered by the Arizona Supreme Court for creating such an exception was the argument that such warrantless searches were justified by the "need for all citizens and particularly potential victims such as this to effective protection from crime". State v. Sample, 107 Ariz. 407, 410, 489 P.2d 44, 47 (1971), writ of habeas corpus ordered conditionally granted, sub nom. Sample v. Eyman, 469 F.2d 819 (9th Cir. 1972); see State v. Duke, 110 Ariz. 320, 324, 518 P.2d 570, 574 (1974).

The Arizona Supreme Court has simply made an arbitrary determination that cases involving bodily injury are more serious than other cases and require less attention to the protection of individual rights. If Arizona can make such a determination now, then in the future it or other jurisdictions can abolish the search warrant requirement in cases of rape, espionage, treason, extortion, kidnapping, terrorism, arson, counterfeiting, robbery and burglary, each of which is a class of crimes posing serious threats to society.

Who is to say which class of crimes is most serious? The argument that more "effective" protection from crime is needed is an argument which may be made against every restraint the Constitution imposes upon police authority in the interest of personal liberty Moreover, the Arizona Supreme Court has never shown, and it could not show, how its proposed exception to the warrant requirement would

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significantly increase police protection over that permitted by the traditional exigent circumstances exception.

The "murder scene exception" is not a doctrine permitting police entry upon premises. It is a doctrine permitting warrantless searches. In fact, it effectively abrogates any warrant requirement for a particular class of criminal investigations. Rather than encouraging determinations by a neutral, detached magistrate of the reasonableness of a search, Arizona's rule promotes searches based solely upon a police officer's perception of what is "a serious personal injury" and of whether "there is reason to suspect foul play". There is not even a probable cause requirement. The reasons for the search do not have to be explained in advance; they can be reconstructed with the benefit of hindsight.

In some instances, courts have spoken about murder scene exceptions to warrant requirements when their intent was to authorize police to enter premises with the intent of rendering emergency aid. See Root v. Gauper, 438 F.2d 361, 364-65 (8th Cir. 1971). Even if such had been a consideration in the development of the Arizona doctrine, the police here did not enter with the intent of rendering aid to an injured person. They entered with the intent of making arrests. The search itself occurred after the injured people had been removed from the premises.

The police in Mr. Mincey's case knew before the search began that Officer Headricks' injuries had resulted from gunshot wounds. The search, therefore, was not conducted in aid of treatment, as for example might be the case in a poisoning incident.

Arizona's rule places no genuine limitations on the scope of searches. Although the rule purports to limit searches to what is necessary to determine the circumstances of death, here a four day long complete inventory of Mr. Mincey's home was held to come within that limitation.

The search in this case violated the spirit, purpose and letter of the Fourth Amendment. The evidence which derived from that search should have been suppressed.

ARGUMENT II

THE ADMISSION OF PETITIONER'S RESPONSES TO POLICE QUESTIONING MADE WHILE PETITIONER WAS A PATIENT IN THE INTENSIVE CARE UNIT OF A HOSPITAL VIOLATED HIS PRIVILEGE AGAINST SELF-INCRIMINATION, AND RIGHTS TO COUNSEL AND DUE PROCESS OF LAW UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION.

The use of Mr. Mincey's responses to police questioning while in the hospital's intensive care unit violated his privilege against self-incrimination, and rights to counsel and due process of law under the Fifth, Sixth and Fourteenth Amendments to the Constitution. The trial court and the Arizona Supreme Court found the responses to have been obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1964), but sustained their admissibility as within the exception created by Harris v. New York, 401 U.S. 222 (1971). Harris and the decisions which have followed it[1] permit an accused person to be impeached[2] with Miranda violative statements if (1) the statements are inconsistent with the accused's testimony at trial bearing directly on the crime charged, and (2) the statements were obtained under circumstances assuring their trustworthiness and voluntariness. The statements in the case at bench meet neither requirement.

The responses used for impeachment were not inconsistent with Mr. Mincey's testimony at trial. Petitioner testified that he had seen a gun in Officer Headricks' hand when Headricks entered the bedroom. As impeachment, the prosecution offered a statement made in response to a question which asked, did "this guy" who came into

[1] E.g., Oregon v. Haas, 420 U.S. 714 (1975).

[2] Arizona permits prior inconsistent statements to be considered by the jury as substantive evidence. State v. Skinner, 110 Ariz. 135, 515 P.2d 880 (1973).

the bedroom have a gun? The response had been, "I can't say for sure. Maybe he had a gun," and Petitioner indicated that he hadn't been sure whether by "this guy" the interrogator had meant Headricks or the officer who found him after he'd been shot, or what.

Mr. Mincey also testified that at the time Officer Headricks entered the bedroom with his drawn gun, he had no idea the entry was for purposes of making an arrest. The prosecutor offered a statement made in response to a question regarding what Mr. Mincey had meant when he wrote that "all hell turned loose". Petitioner's response, given at a time when he had already been informed that he was under arrest and being charged with the murder of a police officer, was that he meant when the "bust" took place. That response simply indicated that several hours after Headricks entered his bedroom, and after Mr. Mincey had been made aware that Headricks and his companions were police officers, and after Mr. Mincey had been advised that he was under arrest and was being charged with murder of a police officer, Mr. Mincey knew that the commotion had resulted from a police "bust"; it did not indicate what his knowledge or state of mind was at the time of the break-in.

The rationale for permitting an exception to the Miranda exclusionary rule is that the shield provided by Miranda should not be perverted into a license to testify inconsistently or perjuriously. That rationale becomes meaningless if the statements introduced to impeach are not in fact inconsistent. Furthermore, as this Court has recognized, it is basic to the law of evidence that before a prior statement can be used to impeach by inconsistency, the statement must indeed be inconsistent. United States v. Hale, 422 U.S. 171 (1975). And a witness must be given full opportunity to clarify his statement before impeachment testimony may be admitted. The Charles Morgan, 115 U.S. 69 (1885). Neither criterion was met in this case.

Whether or not Mr. Mincey's testimony at trial was inconsistent, his responses to the in-hospital interrogation failed to meet traditional standards of trustworthiness and voluntariness. The statements made in the intensive care unit of the hospital were the direct result of an overborne will. The circumstances under which the statements were made are undisputed.

At times during the interrogation, Mr. Mincey looked exhausted to his interrogator. He had not slept for some time, and at least twice during the interrogation he lapsed into unconsciousness. When a person is fatigued, his will is more easily overborne. E.g., Ashcraft v. Tennessee, 327 U.S. 274 (1946), connected case 322 U.S. 143 (1944).

Petitioner indicated repeatedly that he wished the questioning discontinued, and requested the aid of counsel seven times. The failure to inform a suspect of his right to counsel is a "significant factor" in determining the voluntariness of a statement. E.g., Davis v. North Carolina, 384 U.S. 737, 740 (1966). Even more intimidating is the effect of having one's requests for counsel and that questioning be stopped repeatedly denied, frustrated or ignored. See, e.g., Culombe v. Connecticut, 367 U.S. 568 (1961).

It is further uncontested that the interrogation took place only about four hours after the Petitioner was received in surgery for his gunshot wound. He could not speak. The only sustenance that Mr. Mincey was receiving was through intravenous feeding. The lack of substantial food diminishes one's physical strength and ability to resist. E.g., Davis v. North Carolina, 384 U.S. 737, 746 (1966).

Petitioner was being given oxygen through an oral tracheal tube, a method generally used only for patients in critical condition. He had a nasal gastric tube running from his nose to his stomach to prevent him from aspirating vomit, and Petitioner was catheterized. Mr. Mincey indicated that he was in pain and that the pain was unbearable. Such intense pain also diminishes the

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ability to resist. E.g., Reck v. Pate, 367 U.S. 433, 441-42 (1961).

The only persons who had access to the Petitioner were the police and hospital personnel. Nurse Graham, in whose hands Mr. Mincey's well being was entrusted, encouraged him to respond to Detective Hust's questioning. Isolation from one's friends and from counsel has been consistently recognized by this Court as an important factor to be considered in determining voluntariness. E.g., Sims v. Georgia, 389 U.S. 404 (1967); Haynes v. Washington, 373 U.S. 503 (1963); Fikes v. Alabama, 352 U.S. 191 (1957).

Petitioner expressed uncertainty as to his ability to accurately recall the facts. He had received numerous drugs in an effort to stabilize his condition. Nurse Graham was unsure whether Petitioner was under the influence of drugs at the time of the interrogation. Statements made under the influence of drugs do not meet traditional standards of voluntariness. Cf., Townsend v. Sain, 372 U.S. 293 (1963).

Petitioner's lack of experience with the police is yet another factor to be considered in determining voluntariness. E.g., Haley v. Ohio, 332 U.S. 596 (1948).

Mr. Mincey was helpless. He could not walk away from the police officer or even turn his back on him. He could not even speak to tell him to leave. He could only communicate by laborious writing. His strength was sapped by serious injury and surgery. He was in pain, weak and confused. He asked for counsel and to be left alone, but no one complied; no one came to his aid, not even the one person he should have been able to turn to, his nurse. The questioning continued, unrelenting and without regard to his pleas to stop or for counsel. The police officer would not leave Mr. Mincey alone until he received the statements he was seeking.

Clearly, Petitioner's will was overborne. The above-described factors cannot be considered circumstances assuring the voluntariness or trustworthiness of his statements.

It must be emphasized that all we can be sure of are the Petitioner's protestations and statements, since they were written out. There are no equally accurate records of what questions were asked.

It should also be noted that the trial court here never made a finding that the statements admitted against Mr. Mincey were voluntary, in contravention of Jackson v. Denno, 378 U.S. 368 (1964).

Since Mr. Mincey's hospital interrogation statements do not meet the test of Harris, they should have been suppressed.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgmentand opinion of the Supreme Court of the State of Arizona.

RESPECTFULLY SUBMITTED this 26 day of August, 1977.

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IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA,
Appellee,
v.
RUFUS JUNIOR MINCEY,
Appellant.

No. 3283

Appeal from the Superior Court of Pima County
(Cause No. A-26666)
The Honorable Mary Anne Richey, Judge
Affirmed in Part and Reversed and Remanded in Part

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By Albert Perry Dover

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By Richard S. Oseran

Attorneys for Appellant

GORDON, Justice:

Appellant, Rufus Mincey, was convicted in a jury trial of murder, first degree, in violation of A.R.S. §§ 13-451, 13-452 and 13-453, assault with a deadly weapon in violation of A.R.S. § 13-249 B, unlawful sale of narcotics in violation of A.R.S. § 13-1002.02, unlawful possession of narcotic drug for sale in violation of A.R.S. § 36-1002.01, and unlawful possession of narcotic drug in violation of A.R.S. § 36-1002. He was sentenced to serve a term of life without possibility of parole until twenty-five years are served for Count I; to serve not less than ten nor more than fifteen years for Count II, to run concurrently with the life sentence; to serve not less than five years nor more than fifteen years for Count III, to run consecutively to the life sentence; to serve not less than five years nor more than six years for Count IV, to run concurrently with Count III; to serve not less than two years nor more than three years for Count V to run concurrently with Count III. We have jurisdiction to review this judgment under A.R.S. § 13-1711. The judgment of the trial court is reversed and remanded as to Counts I and II; judgment is affirmed as to Counts III, IV and V but remanded for resentencing.

This appeal arose out of a tragic incident in Tucson, Arizona on October 28, 1974. It began with a planned "buy-bust" by the Metropolitan Area Narcotics Squad, based originally on information from an informant. Although the testimony conflicts in some areas, on appeal we view the evidence in the light most favorable to upholding the verdict. The facts for the purpose of this appeal are as follows:

Sometime around 2 p.m. on October 28, 1974 undercover agent Barry Headricks of the Metropolitan Area Narcotics Squad went to the apartment leased by appellant. Accompanying Headricks was Charles Ferguson, the victim in the assault with a deadly weapon charge. Headricks, according to testimony, looked like a typical undercover narcotics officer: mustache and longish hair, cowboy boots, levis and a levi jacket. He also had an electronic monitering device so that the other agents could overhear what went on.

After Headricks and Ferguson were admitted, a deal was made for the sale of a specified amount of narcotics and both appellant and Ferguson were charged with this sale. While in the apartment Headricks saw a gun in the possession of another man (probably Ferguson) in appellant's apartment. (Also in the apartment was appellant's girlfriend. When the agents returned later there were two more people in the apartment.) Headricks then left the apartment with the purported purpose of returning with the money to pay for the drugs. Actually Headricks met a fellow agent and they and eight other officers prepared to carry out the

prearranged plan to consummate the "buy-bust".[1/]

Headricks and another agent (Schwartz), purportedly his "money man", went up to the door of the apartment with drawn guns hidden behind their backs. Eight other agents and a deputy county attorney were to be waiting with drawn guns out of sight of the doorway; in fact John Hodgman, who opened the door, apparently saw the other agents and tried to close the door. Headricks knocked on the door and when the door opened he announced that it was the police, according to one officer's testimony. Hodgman tried to close the door as Headricks slipped into the apartment. Agent Schwartz prevented the door from closing and he and other agents forced entry. As the door was forced back, Hodgman was pushed partly through the wall behind the door. Schwartz

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1/ A "buy-bust" occurs when the undercover agent or agents make contact with a person who allegedly has illegal drugs for sale and make an offer to buy. If the agent sees the drugs or has enough information to be sure that the person does have the drugs, then an arrest is made. Commonly, as here, the plan is for the agent to leave momentarily and then a number of agents will come back to make the arrests. The usual plan is for the original undercover agent to get the door opened using his undercover identity and then the rest of the agents rush in.

and at least one other agent held Hodgman to the ground and handcuffed him. Schwartz pointed his gun at a woman who was in the room and told her "police, freeze". Moments later another agent pointed his gun at her and, in more obscene terms, told her to freeze or he'd blow her head off. At some time during these occurrences, a number of shots in rapid succession could be heard coming from the bedroom at the back of the apartment which Headricks had entered. It was later shown that both men emptied their guns shooting at each other. (One bullet, later shown to be from appellant's gun, came through the wall and grazed Ferguson's head where he was being held at gunpoint against the wall by another agent. Both men went down to the floor. This incident was the basis of the assault with a deadly weapon charge.) Shortly after the shooting stopped, Headricks came out of the bedroom, said something like "he's down," and fell to the ground. Some agents ran to Headricks to give aid and someone called for emergency assistance. Meanwhile Agent Fuller went to the bedroom door and yelled "police officer, freeze" or "come [illegible]" or something of that nature. Fuller testified that he saw a movement on the other side of the bed and then nothing more. Fuller and another agent entered the room, proceeding along the side walls. Fuller saw a woman lying on a closet floor and asked her if she was all right. When she said no he told her to stay there and help would come soon. Fuller then crawled across the bed and found appellant lying on

his back on the far side of the bed, with no visible wounds and with an automatic pistol under his hand. Appellant failed to respond to speech or to being prodded with Fuller's pistol. When the agents tried to move Mincey they saw blood underneath him and so they left him there until the ambulance came.

No weapons other than the pistol found near appellant's hand were found on any of the suspects. That weapon, a Llama .380 semi-automatic, was found to be empty when one of the agents examined it. Three other weapons were found in the living room during a subsequent search. Headricks' police special .38 revolver was also empty and was later shown to be the weapon which made those bullet holes not shown to have been caused by appellant's gun. When Headricks was taken out on a stretcher, a small semi-automatic pistol was found on the floor under where his body had been. Testimony at trial speculated that he had been carrying this second pistol in his belt at his back as is a common practice among undercover narcotics agents. The presence of the fourth pistol was not explained at trial, but it apparently had not been recently fired.

After the shootings, the narcotics agents did no investigating but waited for a special investigative team in accordance with Tucson Police Department procedure. The investigating officers searched the premises and examined the scene over a period of four days. No search warrant

was obtained and no reason appears for not seeking one. Although no witness was absolutely sure, the officers apparently learned of Headricks' death after the search of the scene began.

Three or four hours after appellant arrived at the hospital emergency room, Officer Hunt interrogated him in the intensive care unit. Appellant was being fed intravenously, had a tube down his throat giving him oxygen to help him breathe, a tube in his nose down into his stomach to keep him from vomiting, and a catheter tube to his bladder. A nurse in the intensive care unit allowed the police officer to question appellant although appellant was unable to talk and had to answer by writing notes. Some of these answers were used in an attempt to impeach appellant by prior inconsistent statements at trial. Appellant was in pain but there is no evidence that he was sufficiently under the influence of medication to render his statements involuntary and inadmissible.

The interrogation began with questions concerning another wounded suspect. Then appellant learned he was charged with killing a police officer and was given his Miranda rights. The trial court granted appellant's motion to suppress this interview as to its use in the prosecution's case in chief but allowed its use for impeachment purposes. The interrogation lasted about one hour but the officer twice stopped the questioning when appellant either fell

asleep or lapsed into unconsciousness.

On November 1, 1974 appellant was charged in a five-count indictment and on June 12, 1975 a jury returned guilty verdicts on all five counts. Appellant's motions for acquittal notwithstanding the verdict and for a new trial were denied and sentence was imposed on July 15, 1975. Thereafter appellant filed a timely notice of appeal to this Court.

Appellant raises a number of issues which we have rearranged and reworded so as to deal with them more concisely:

1. Did the jury instructions present an incorrect mens rea requirement for murder "committed in avoiding or preventing lawful arrest" (A.R.S. § 13-452), thereby compelling reversal?

2. Was it reversible error to permit the state to impeach appellant with statements made by him while he was in the hospital intensive care unit?

3. Was it reversible error to admit evidence that appellant had falsified information on the federal firearms form for appellant's pistol?

4. Was it reversible error to admit statements made by appellant two and one-half months before the incident?

5. Was it reversible error to deny defendant's motion to suppress on the basis of an illegal entry in violation of A.R.S. § 13-1411?

6. Was it reversible error to deny appellant's motion to suppress on the basis of an illegal warrantless search?

7. Was it reversible error to deny appellant's motion

to sever the murder count from the other counts in the indictment?

8. Was the prosecutor's conduct in closing argument so inflammatory as to deny appellant a fair trial?

Mens Rea for the Murder Charge

Appellant was charged with murder "which is committed in avoiding or preventing lawful arrest", A.R.S. § 13-452. He alleges error in terms of the propriety of certain jury instructions but the underlying issue concerns the mens rea required for this kind of murder. This is an issue of first impression before our Court.

One challenged instruction reads:

> "If a person has knowledge, or by the exercise of reasonable care should have knowledge, that he is being arrested by a peace officer, it is the duty of such a person to refrain from using force (or any weapon) to resist such arrest.
>
> "However, if you find that the peace officer used excessive force in making the arrest, it is not the duty of such person to refrain from using reasonable force to defend himself against the use of such excessive force." (Emphasis added.)

The other challenged instruction reads:

> "A person who knows or has reason to know that he is being illegally arrested may use such force, short of taking life, as is necessary to regain his liberty. A person resisting an illegal arrest may use only that force reasonably necessary to effect that purpose.
>
> "A person who knows or has reason to know that he is being lawfully arrested has a duty to refrain from using any force to resist arrest." (Emphasis added.)

We agree that these instructions do not present the proper mens rea or scienter requirement for this kind of first degree murder. The provision of A.R.S. § 13-452 under which appellant was charged does not expressly provide a scienter requirement. The rule, barring a few exceptions, is that wrongful intent or mens rea is required before there can be criminal punishment. State v. Cutshaw, 7 Ariz.App. 210, 437 P.2d 962 (1968); Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1951). The exceptions occur only when the legislative power has expressly so determined, as where criminal negligence takes the place of the intent requirement. State v. Chalmers, 100 Ariz. 70, 411 P.2d 448 (1966). Where the penal statute fails to expressly state the necessary element of scienter, this Court may infer the

scienter requirement from the words of the statute plus legislative intent. State v. Berry, 101 Ariz. 310, 419 P.2d 337 (1966).

We hold that the scienter requirement for first degree murder "which is committed in avoiding or preventing lawful arrest," A.R.S. § 13-452, is knowledge that the victim was a law enforcement officer. That is, a defendant is guilty under § 13-452 if the murder is committed while knowingly avoiding or preventing a lawful arrest. This holding is based on the words of the statute and the legislative intent.

The words of this provision are similar to A.R.S. § 13-541 A, Resisting, delaying, coercing or obstructing public officer. This statute uses both the terms "wilfully" and "knowingly" in various provisions. We agree with the Court of Appeals that § 13-541 requires knowledge on the part of the defendant that the other person is a public officer. State v. Tages, 10 Ariz.App. 127, 457 P.2d 289 (1969). It is logical to assume the Legislature intended a similar knowledge requirement in § 13-452.

Even more persuasive is the fact that we are dealing with a first degree murder statute which carries the most drastic penalty in our system of criminal justice -- death. Such a penalty has traditionally required criminal intent as the mens rea, and a lesser mental state such as criminal negligence is covered in a manslaughter statute. E.g., A.R.S. § 13-456. Our statute defining first degree murder, A.R.S.

§ 13-452, was amended in 1973 to add the avoiding or preventing lawful arrest provision. Preceeding this provision is the provision for wilful, deliberate or premeditated killing and following it is the felony murder provision. The first provision by its terms requires scienter, and the felony murder provision requires an intent to commit the underlying felony. State v. Akins, 94 Ariz. 263, 383 P.2d 180 (1963).

In this context the Legislature would not have intended the death penalty for a negligent killing nor would they have intended strict liability for killing a police officer even where the facts otherwise objectively show justifiable homicide. A knowledge requirement for first degree murder committed in avoiding or preventing a lawful arrest is mandated.

In fact, the jury was given a proper instruction because the trial court modified the state's requested jury instruction by adding the word "knowingly:"

> "A murder which is perpetrated by lying in wait or by any other kind of wilful, deliberate and premeditated killing, or which is perpetrated in knowingly avoiding a lawful arrest is murder in the first degree." (Emphasis added.)

So the issue is analogous to our recent decision in State v. Rodriguez, ___Ariz. ___, 560 P.2d 1238 (1977): conflicting jury instructions were given concerning the intent or mens rea necessary for conviction.

In Rodriguez we concluded under the facts of that case that the incorrect instruction was not so prejudicial as to

require reversal. Two crucial facts in this determination were that other than the reading of the instructions, the incorrect instruction was never mentioned to the jury and that the correct intent requirement was "brought home forcefully to the jury in closing arguments no less than six times." State v. Rodriguez, ____Ariz. at ____, 560 P.2d at 1241.

The situation was exactly the opposite at appellant's trial. In closing argument the prosecutor emphasized the incorrect instruction, discussing it at least twelve times. The case went to the jury on an alternative theory of negligence ("knew or by exercise of reasonable care should have known"). Under these circumstances we have no way of knowing on what basis the jury determined appellant's guilt. Conviction under the avoiding arrest section of A.R.S. § 13-452 requires that the jury find the defendant acted knowingly. The jury here could have rendered a guilty verdict on the basis of negligence rather than knowledge.

For the foregoing reasons, we find the giving of the challenged instructions was prejudicial and reversible error. Accordingly, the judgment of the trial court as to Count I (murder, first degree) is reversed. Because the conviction on Count II (assault with a deadly weapon) may involve the same issues discussed supra, the judgment as to Count II is also reversed.

Statements in Intensive Care Unit

Under the circumstances described, supra, appellant was interrogated while in the Intensive Care Unit of the University of Arizona Hospital. Miranda[2/] warnings were given, but after each indication from appellant that he wanted to consult an attorney or that he wanted to stop answering questions, the police officer continued to question appellant.

The United States Supreme Court held in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) that police must cease questioning when the suspect indicates he wishes to assert his right to remain silent or his right to an attorney. This mandate was recently affirmed in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) and Oregon v. Haas, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); cf. Brewer v. Williams, No. 74-1263 (U.S., Mar. 23, 1977). Statements made in violation of this rule are not admissible in the prosecution's case in chief but may be used for impeachment purposes (if the defendant takes the stand at trial) so long as traditional standards of voluntariness and trustworthiness are met. Oregon v. Haas, supra; Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

Prior to trial appellant made a motion to suppress the statements he made while being interrogated at the hospital, arguing their inadmissibility for all purposes because of violations of the requirement of Miranda and because of lack of voluntariness. A hearing was held as required by

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2/ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 94 (1966).

State v. Owen, 96 Ariz. 274, 394 P.2d 206 (1964), and testimony and oral argument were heard by the trial court. The court granted appellant's motion as to use of the statements in the prosecution's case in chief but denied the motion as to use for impeachment purposes.

The court did not make a specific finding as to the voluntariness of the statements. In 1964 the United States Supreme Court held that before a confession can be admitted into evidence, the trial judge must hold a hearing outside the presence of the jury and make a clear finding of voluntariness. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964). Since then this Court has consistently held that failure to make a definite ruling on voluntariness before admission requires either a remand for the trial court to make such a finding or reversal unless the admission of the evidence itself was harmless error. State v. Marovich, 109 Ariz. 45, 504 P.2d 1268 (1973). This rule applies here because for the purposes of compliance with Jackson v. Denno, supra, there is no difference between confessions and admissions. State v. Owen, supra.

We stated in Marovich, supra, in dictum that denial of a motion to suppress could be tantamount to a finding of voluntariness where it is clear the trial court understood Jackson v. Denno and merely worded the ruling badly. We believe such a situation occurred here. Under the circumstances of this case, it is clear that a finding of voluntariness underlies the trial court's ruling and therefore the lack of such a specific finding is not reversible error.

In this case the prosecutor told the trial court that he did not intend to use these statements in his case in chief, and so his only argument at the hearing was that the statements were voluntary and admissible for impeachment purposes. The United States Supreme Court rule described supra is that to be admitted for impeachment purposes statements which violated Miranda must pass traditional voluntariness and trustworthiness standards. In the context of this case, the trial court's decision to exclude the statements in question for purposes of the prosecution's case in chief but to admit them for impeachment purposes can be based only on an underlying decision that the statements violate Miranda but do not offend traditional standards of voluntariness. We hold the failure to make specific findings, although error, is not reversible error under the specific circumstances of this case.

In addition to the problem of the lack of a specific finding of voluntariness appellant urges this Court to find reversible error because the statements were not in fact voluntary. It is well settled that the trial court's determination of the admissibility of a defendant's statement will not be overturned unless clear and manifest error appears. E.g. State v. Edwards, 111 Ariz. 357, 529 P.2d 1174 (1975). We look to the totality of the circumstances to decide if the statements were properly admitted. State v. Miller, 110 Ariz. 597, 522 P.2d 23, cert. denied, 419 U.S. 1004, 95 S.Ct 325, 42 L.Ed.2d 281 (1974). The evidence in this case is sufficient to support the determination of the trial court.

There was testimony that the nurse in the intensive care unit gave the police officer permission to interrogate appellant and that she was present during the interrogation. She testified that she had not given appellant any medication and that appellant was alert and able to understand the officer's questions. She also testified that neither mental or physical force nor abuse was used on appellant. She said that appellant was in moderate pain but was very cooperative with everyone. The interrogating officer also testified that appellant did not appear to be under the influence of drugs and that appellant's answers were generally responsive to the questions.[3/] The officer testified that he used no force or coercion, neither mental or physical. Nor were any promises made. On the basis of this testimony the admission of the statements for impeachment purposes was not an abuse of discretion.

Appellant also makes some arguments concerning whether the impeaching statements are sharply contradictory to his testimony. These arguments go to the weight and not the admissibility of the evidence.

For the foregoing reasons we uphold the trial court's determination of the admissibility for impeachment purposes

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3/ We might add at this point the fact that appellant was able to write his answers in a legible and fairly sensible fashion provides further support for the trial court's determination.

of appellant's statements made while in the hospital.

Admission of Federal Firearms Form

Appellant argues that admission of the federal firearms form on which he falsely denied he was a heroin addict is improper and inadmissible impeachment by prior misconduct and is irrelevant as well. Appellant admits in his brief, however, that it would be admissible to show intent, citing State v. Schmid, 107 Ariz. 191, 484 P.2d 187 (1971). It would also be admissible, of course, to impeach appellant by a prior inconsistent statement. Both of these bases for admission apply here and the evidence is, therefore, relevant also.

One aspect of the prosecution's case was to attempt to show that appellant had been planning to shoot any police officer who might "hassle" him, thereby negating appellant's self-defense claim. Appellant testified that he thought he had purchased the pistol used in the shooting some three or four weeks prior to the time he had actually purchased it. The implication of that part of his testimony was that the gun had been purchased with no specific purpose. The firearm form was introduced to show that it had been purchased very shortly before the shooting. Cross-examination of appellant also brought out the fact that appellant felt he would be unable to purchase a gun legally unless he lied about being a heroin addict. It is clear that admission of the firearms form is relevant both to the intent issue and to

contradict appellant as to date of purchase, and it was admitted for these purposes.

Appellant also argues that even if this evidence is admissible, it is so highly prejudicial that its admission is reversible error. State v. Little, 87 Ariz. 295, 350 P.2d 756 (1960). The evidence here, however, is not highly prejudicial. The jury already knew that appellant was a heroin addict because of his testimony. Evidence of falsification of a federal firearms form is not sufficiently prejudicial to render inadmissible evidence admissible on two other valid grounds. The admission of this evidence was proper.

Statements Made Two and One Half Months Earlier

Appellant challenges the admission of a witness' testimony concerning a conversation which occurred two and one half months prior to the shooting. The witness testified that appellant said he planned to buy a sawed-off shotgun in case anyone hassled him or in case the pigs hassled him. Appellant, citing Wigmore on Evidence, §§ 394-396, argues that this statement concerning his mental state is inadmissible because (1) it is not a threat against a specific class, (2) there is no showing of a continuing mental state until the time of the shooting, and (3) the shooting incident was not a manifestation of the statement.

The statement in question can reasonably be interpreted as a threat against a specific class: police. Appellant does not argue there is any ambiguity in the meaning of the term "pigs". That people in general were also included does not take away from the specificity of "pigs".

It is well settled that remoteness in time does not control admissibility of such evidence but rather is a factor to be considered by the jury in determining the weight of the evidence. Sparks v. State, 19 Ariz. 455, 171 P. 1182 (1918); State v. Moore, 111 Ariz. 355, 529 P.2d 1172 (1974). It is impossible to set definitive guidelines as to the time limits for evidence of a continuing state of mind. In State v. Moore, supra, we upheld admission of two statements made eighteen months and one year prior to the incident at issue. The time period here is, of course, much less remote and admission of the statement was proper. It is within the jury's province to determine the weight of such evidence.

Similarly, so long as it is a reasonable inference, it is within the jury's province to decide if the shooting incident is a manifestation of the earlier statement. In this case one reasonable inference from the evidence is that the shooting was a manifestation of appellant's earlier statement. The fact that belief in appellant's defense theory would lead one to the opposite inference does not create reversible error or, indeed, any error at all.

Appellant raises some other points but they all go to the weight of the evidence and that is not an issue on appeal. We hold the admission of the prior statement proper.

A.R.S. § 13-1411

Appellant argues that the arrest was illegal due to

noncompliance with A.R.S. § 13-1411 and therefore his motion to suppress all evidence should have been granted. A.R.S. § 13-1411 provides:

> "§ 13-1411. Right of officer to break into building
>
> "An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in § 13-1403, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if the officer is refused admittance after he has announced his authority and purpose."

There was sufficient evidence for the trial court to find that A.R.S. § 13-1411 had been complied with. One officer testified that he heard Officer Headricks say police or something like that when the door was first opened. There was also testimony that at least one other officer announced his authority during the time the officers were trying to push open the door after it had been almost shut. Under all the circumstances of this case there can be no doubt that the person answering the door, when told it was the police, also knew their purpose. If one is in the midst of a drug buy, when the buyer announces that he is a police officer, his purpose is hard to misconstrue.

Appellant also discusses Headricks' entry into appellant's bedroom. That entry is relevant to the self-defense issue but not to A.R.S. § 13-1411 which deals only with breaking into a building not with actions after entry.

We uphold the trial court's denial of the motion to suppress regarding A.R.S. § 13-1411.

Warrantless Search

Appellant argues that the warrantless search of his apartment was illegal in violation of the Fourth Amendment of the United States Constitution. He alleges--correctly --that there were not sufficient facts to fit within the usual "exigent circumstances" exception and that there was ample time to secure a warrant. Thus the issue is whether this Court will adhere to its previous rulings which hold the search of a murder scene under certain circumstances to be a valid exception to the constitutional warrant requirement. State v. Sample, 107 Ariz. 407, 489 P.2d 44 (1971); [4/] State v. Superior Court, 110 Ariz. 281, 517 P.2d

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4/ The United States Court of Appeals for the Ninth Circuit disagreed, Sample v. Eyeman, 469 F.2d 819 (9th Cir. 1972). There are, however, a number of other jurisdictions with some sort of murder scene exception: e.g., Stevens v. State, 443 P.2d 600 (Alaska 1968), cert. denied, 393 U.S. 1039, 89 S.Ct. 662, ___L.Ed.2d ___(1969); People v. Wallace, 31 Cal.App.3d 865, 107 Cal. Rptr. 659 (1973); Patrick v. State, 227 A.2d 486 (Del. 1967); State v. Chapman, 250 A.2d 203 (Me. 1969); State v. Oakes, 276 A.2d 18 (Vt.), cert. denied, 404 U.S. 965, 92 S.Ct. 340, 30 L.Ed.2d 285 (1971); Longuest v. State, 495 P.2d 575 (Wyo.), cert. denied, 409 U.S. 1006, 93 S.Ct. 438, 34 L.Ed.2d 299 (1972). Contra, People v. Williams, 557 P.2d 404 (Colo. 1976). The United States Supreme Court has not disapproved of any of these decisions.

1277 (1974); State v. Duke, 110 Ariz. 320, 518 P.2d 570 (1974).

After reviewing this issue we are reaffirming our rule. We will set some guidelines, however, because we support the principle that "[s]earches conducted without a warrant issued upon probable cause are 'per se unreasonable * * * subject only to a few specifically established and well-delineated exceptions.' Schneckloth v. Bustamonte, 412 U.S. 218 at 219, 93 S.Ct. 2041, at 2043, 36 L.Ed.2d 854, at 858 (1973)." State v. Sardo, 112 Ariz. 509, 543 P.2d 1138 (1975). With the guidelines, infra, in this opinion, search of a murder scene is such a "specifically established and well-delineated exception."

We hold a reasonable, warrantless search of the scene of a homicide -- or of a serious personal injury with likelihood of death where there is reason to suspect foul play -- does not violate the Fourth Amendment to the United States Constitution where the law enforcement officers were legally on the premises in the first instance. We chose not to limit this warrant requirement exception only to actual murders because immediate action may be important to determining the circumstances of death and because a reasonable search should not later be invalidated because the intended murder victim may be saved by a medical miracle. For the ~~search~~ to be reasonable, the purpose must be limited to determining the circumstances of death and the scope must not exceed that purpose. The search must also begin within a reasonable period following the time when the officials first learn of the murder (or potential murder). Cf. State v. Duke, supra.

We find the search of appellant's apartment falls within the murder scene exception to the Fourth Amendment warrant requirement. Although Officer Headricks may not have been dead before the search began, it was reasonable to believe that death was likely and that a murder charge was a possibility. The search was aimed at establishing the circumstances of death (bullet trajectories, e.g.) and included evidence relevant to motive and intent or knowledge (narcotics, e.g.). The search began when the investigative unit arrived, in accordance with Police Department procedures. For these reasons, the search was legal and the trial court's denial of appellant's motion to suppress was proper.

Severance of the Murder Count

Appellant argues it was prejudicial, reversible error for the trial court to deny his motion to sever the murder count from the other counts listed in the indictment. We find no error. So long as the determination is within the guidelines of Rule 13.3 for joinder and Rule 13.4 for severance, of the Rules of Criminal Procedure, 17 A.R.S., it is within the trial court's discretion to deny appellant's motion. E.g., State v. Williams, 108 Ariz. 382, 499 P.2d 97 (1972); State v. Buggs, 108 Ariz. 425, 501 P.2d 9 (1972).

We find Rule 13.3(a)(2) controlling as to joinder in this situation:

"Rule 13.3 Joinder

"A. Offenses. Provided that each is stated in a separate count, 2 or more offenses

may be joined in an indictment, information, or complaint, if they:

* * *

"(2) are based on the same conduct or are otherwise connected together in their commission * * *."

The murder, assault with a deadly weapon, and drug charges were all part of a continuing series of events, and are "otherwise connected together in their commission." Cf. State v. Tynes, 95 Ariz. 251, 389 P.2d 125 (1964).

Rule 13.4(a) provides the standard for severance:

"Rule 13.4 Severance

"A. In General. Whenever 2 or more offenses or 2 or more defendants have been joined for trial, and severance of any or all offenses, or of any or all defendants, or both, is necessary to promote a fair determination of the guilt or innocence of any defendant of any offense, the court may on its own initiative, and shall on motion of a party, order such severance.

* * *

This Court will reverse the denial of a motion to sever only when a clear abuse of discretion is shown. State v. Dale, 113 Ariz. 212, 550 P.2d 83 (1976).

No such abuse of discretion, i.e. prejudice, can be shown here because the evidence as to the other counts would have been admissible at the murder trial even if severance had been granted. The evidence would be admissible on two bases: as relevant to the issue of intent and as part of the complete picture. State v. Schmid, supra; State v. Villavicencio, 95 Ariz. 199, 388 P.2d 245 (1964).

Since we find no prejudice, we hold the denial of the motion to sever was proper.

Prosecutor's Closing Argument

Appellant points to a single statement in the prosecutor's closing argument and argues that it is so inflammatory and prejudicial as to deprive him of a fair trial:

"Don't tell every heroin pusher in town that he can have a gun; that he can have it loaded; that he can shoot a pig if he feels hassled and that all he need do, is take the witness stand and say, 'Yes, sir; no sir,' and claim that he had no idea that he was shooting a cop."

The rule in Arizona is that counsel may draw reasonable inferences from and appraise evidence which was adduced at trial. State v. King, 110 Ariz. 36, 514 P.2d 1032 (1973).

The statement in question is based on the evidence. There was testimony that appellant was a heroin dealer, that he had a loaded gun, that he shot a police officer, and his defense was that he had no idea that he was shooting a police officer. It is a reasonable inference, if the evidence pointing to appellant's guilt is believed, that acquitting appellant might

indicate to other heroin sellers that they could get away with the same thing.

The problem with the prosecutor's statement is that it is an emotional appeal to the jury's fears. Although in closing argument both counsel have wide latitude, State v. Landrum, 112 Ariz. 555, 544 P.2d 664 (1976), such an appeal to fear is improper. Cf. State v. Makal, 104 Ariz. 476, 455 P.2d 450 (1969); State v. Huson, 73 Wa.2d 660, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S.Ct. 886, ___L.Ed.2d ___(1969). We need not determine, however, whether it was so prejudicial as to require reversal because we are reversing on other grounds, supra. If the murder and assault charges are retried on remand, we urge counsel to refrain from appeals to juror's fears.

Conclusion

For the foregoing reasons, the judgment of the trial court as to Counts I (murder, first degree) and II (assault with a deadly weapon) is reversed and remanded for proceedings consistent with this opinion. The judgment of the trial court as to Counts III, IV and V (unlawful sale of narcotics, unlawful possession of narcotic drug for sale and unlawful possession of narcotic drug, respectively) is affirmed. Because

the sentence for Count III was to run consecutively to that of Count I (IV and V were concurrent with III) we are remanding on Counts III, IV and V for resentencing.

FRANK X. GORDON, JR.
Justice

CONCURRING:

JAMES DUKE CAMERON
Chief Justice

FRED C. STRUCKMEYER, JR.
Vice Chief Justice

HAYS, specially concurring.

I concur with the majority in all respects except that I take exception to the characterization of the county attorney's statement in argument as being "an emotional appeal to the jury's fears." If oral argument at the close of the case is to have any purpose, it must be more than a dull and sterile discussion of the evidence. The condemned statement is based on the evidence and the inference drawn therefrom is reasonable. It does not deprive the defendant of legitimate defenses nor does it exceed the bounds of propriety.

JACK D. H. HAYS
Justice

I concur.

WILLIAM A. HOLOHAN
Justice

Phoenix
85007

June 29, 1977

STATE OF ARIZONA, Appellee, vs. RUFUS JUNIOR MINCEY, Appellant.	)	Supreme Court No. 3283 Pima County No. 26666

The following action was taken by the Supreme Court of the State of Arizona on June 28, 1977 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing (Attorney General) - DENIED.

FURTHER ORDERED: Motion for Rehearing (Appellant) - DENIED."

Copy of Order Affirming in Part and Reversing and Remanding in Part enclosed.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO: Hon. Bruce E. Babbitt, Attorney General, 159 Capitol Building, Phoenix, Arizona 85007
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